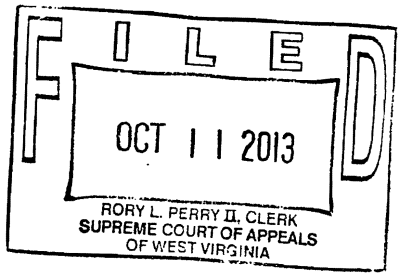

IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
PLAINTIFF BELOW, RESPONDENT

APPEAL NO.: 13-0713

vs.

(Lower Court Case No.: 13-F-7 JPM)
(Ohio County Circuit Court)

GINA MARIE JERROME,
DEFENDANT BELOW, PETITIONER

PETITIONER'S BRIEF

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BRIEF OF THE PETITIONER, GINA MARIE JERROME

TO: THE HONORABLES, THE JUSTICES OF THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

HON. BRENT D. BENJAMIN, CHIEF JUSTICE
HON. ROBIN JEAN DAVIS, JUSTICE
HON. MARGARET L. WORKMAN, JUSTICE
HON. MENIS E. KETCHUM II, JUSTICE
HON. ALLEN H. LOUGHRY, II, JUSTICE

RORY L. PERRY, II, CLERK

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PETITION FOR APPEAL

Comes now, Gina Marie Jerrome, the Defendant below, and Petitioner-Appellant herein, for her petition for appeal, as permitted by the Rules of Appellate Procedure, provides as follows:

ASSIGNMENTS OF ERROR

1. **In permitting a grand larceny jury instruction and trial, the trial court erred, when it concluded that the Defendant's "alleged crime arose out of a single occurrence", and allowed aggregation or combining of values of several petit larcenies, despite the fact that the crimes involved multiple victims, involving three (3) different purses which were located on two (2) different tables.**

2. **The trial court erred when it failed to exclude valuation evidence and permitted the jury to consider the victims' current subjective replacement cost value of stolen cell phones and not current fair market value, when valuing stolen property pursuant to the larceny statute.**

STATEMENT OF THE CASE

This case is an appeal from a larceny criminal proceeding in which the Petitioner/Defendant, who is a twenty-nine (29) year old single mother of a young son with no prior felony history, admitted to engaging in larcenous conduct. The key issue is whether the State can combine replacement cost and not current market values of items taken from multiple victims from what, in essence, is multiple petit larcenies, and permit a jury to add, combine, or aggregate those values to achieve the One Thousand Dollar ($1,000.00) requisite value to constitute a grand larceny.

The Defendant was charged in a two (2) count Indictment by the January 2013 term of the Ohio County, West Virginia grand jury with one (1) count of Grand Larceny in violation of West Virginia Code §61-3-13(a) and one (1) count of Conspiracy to Commit Grand Larceny in violation of West Virginia Code §61-10-31. Prior to trial, the Defendant accepted and admitted her responsibility for the thefts and on March 19, 2013, the Defendant was forced to proceed to trial for the primary purpose of legally challenging the attempts by the State to aggregate replacement cost

values of multiple petit larcenies from multiple victims to establish a grand larceny. The trial lasted approximately ten (10) hours and a verdict was returned on the second day of trial on March 20, 2013. At the close of the State's case-in-chief, the trial court granted the Defendant's motion for judgment of acquittal regarding the conspiracy count. The Defendant was found guilty by the jury of one (1) count of Grand Larceny despite the fact that the jury was also instructed on one (1) count of Petit Larceny. At sentencing, the trial court imposed the statutory sentence of one (1) to ten (10) years incarceration. The Petitioner/Defendant now files this appeal and urges this Court to consider the issues of aggregation of values to constitute a Grand Larceny involving multiple victims, which has been known in other jurisdictions as the "single larceny doctrine", as well as the issue of replacement cost versus current market value. The Petitioner/Defendant urges this Court to provide an opinion to enable some directions for cases throughout the state when addressing these issues which are quite likely to reoccur on a regular basis.

SUMMARY OF ARGUMENT

It would be grossly unfair to permit the State to combine multiple petit larcenies to satisfy the threshold value for grand larceny. Further, it would be equally grossly unfair to permit the State to establish the values of stolen items solely by having the victims testify as to the cost when new and current replacement cost of these stolen items while completely ignoring the current fair market value of the items at the time the items were stolen.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner desire oral argument and believes oral argument is necessary in this matter. The issues contained in this appeal have not been authoritatively decided and this case should be set for oral argument pursuant to Rule 19 of the Rules of Appellate Procedure as it involves assignments of error in the application of current law.

ARGUMENT

1. **In permitting a grand larceny jury instruction and trial, the trial court erred, when it concluded that the Defendant's "alleged crime arose out of a single occurrence", and allowed aggregation or combining of values of several petit larcenies, despite the fact that the crimes involved multiple victims, involving three (3) different purses which were located on two (2) different tables.**

The Petitioner argues that the State should have been precluded, as a matter of law, from arguing that it was permissible for the jury to aggregate or combine values of separate thefts from separate victims, at separate times, approximately twenty to thirty feet away from each other, to be aggregated to constitute a grand larceny, despite the fact that none of the values of items taken from any of the victims, individually, satisfied the requisite One Thousand Dollar grand larceny threshold.

Pursuant to State v. McGraw, 85 S.E.2d 849, Syllabus point 3, "An Indictment for larceny must state the name of the owner of the stolen property or that the property is of some unknown person or persons" (emphasis added). Pursuant to State v. McGraw, while it may be argued that property certainly may have multiple owners, there is no authority or reference to aggregating values of multiple owners of different property for the purposes of satisfying the grand larceny statute. West Virginia Code § 61-3-13, states as follows:

> *Grand and Petit Larceny Distinguished: Penalties. If a person commits a simple larceny of goods or chattels of the value of One Thousand Dollars or more, such person is guilty of a felony, designated grand larceny, ... if a person commits simple larceny of goods or chattels of the value of less that One Thousand Dollars, such person is guilty of a misdemeanor, designated petit larceny, ...*

In the case at bar, it is undisputed that four (4) separate victims had items, primarily electronics devices and cell phones, taken from them at a club. It is further undisputed that the said victims did not all congregate at the same table with some of the victims congregating separately as much as twenty to thirty feet apart. (Trial transcript, page 149) It is further undisputed that each of the four (4) victims, individually, did not have property taken which exceeded One Thousand Dollars, pursuant to their collective trial testimony.

Substantial pre-trial argument ensued regarding the legal question of whether the State could properly aggregate or combine the values of these multiple victims to establish a grand larceny. The parties engaged in substantial argument before the lower court at pre-trial hearing and the court ultimately ruled by its Order entered March 15, 2013, (Appendix Volume 1, Page 25) that "The Court hereby finds and concludes that the Defendant's alleged crime arose out of a single occurrence. As a result, the Court is satisfied that the State's aggregation of the value of the items stolen in order to pursue a felony grand larceny charge with respect to Defendant's actions on the date in question, is appropriate in this case." The lower court further noted the singular location within a club, a somewhat finite window of time, and what the court deemed a "confined area of physical proximity". While the Petitioner certainly respects the aforesaid Order of the Circuit Court, the Petitioner emphasizes that these findings and elements are not founded within West Virginia law. Furthermore, the Petitioner notes that the very ruling in which these findings were made, does not contain any reference or citation to West Virginia law, nor, after substantial research by the parties involved in this matter, could any specific case or statutory law be found which addresses this specific issue.

In this case, the Petitioner submits that no person could properly be on notice of the requisite elements to constitute a felony grand larceny if the State is permitted to add up or aggregate or combine values of separate items taken from separate victims. Rather, the specific definition of petit larceny is more appropriate, albeit four counts, to the facts of this case, given that the value taken from each specific victim is undisputed to be less than One Thousand Dollars each.

2. The trial court erred when it failed to exclude valuation evidence and permitted the jury to consider the victims' current subjective replacement cost value of stolen cell phones and not current <u>fair market</u> value, when valuing stolen property pursuant to the larceny statute.

Petitioner argues that the trial court improperly permitted testimony from each of the four (4) victims in this case pertaining to subjective values for their property based upon their

replacement costs, or specific subjective values to the individual victims. Current fair market value at the time of the theft should be the pertinent issue to consider.

Specifically, victim Chris, provided absurd testimony at trial (Trial transcript, pages 193 - 198) that his used Motorola Razor cell phone which, despite his acknowledgment that he bought it used for Four Hundred Fifty Dollars and in "brand new condition", nonetheless had subjectively increased in value to Six Hundred Fifty Dollars at the time of the larceny months later. Victim Karen was permitted to testify that the value of her one and a half year old cell phone on the date it was stolen was the replacement cost of a new phone of Five Hundred Dollars despite the fact that she did not investigate the cost or value of a used phone. (See Trial transcript, page 110) Victim Sadie, at trial (Trial transcript, page 144) testified that her iPod, in used condition at the time it was stolen, had a value between One Hundred and Fifty and Two Hundred Dollars which was the cost of the phone when she had purchased it new. Furthermore, and perhaps even more absurd than the victim who believed his cell phone went up in value, Victim Lisa testified that her three year old Blackberry cell phone, which was no longer even produced, and arguably obsolete, had maintained its Four Hundred Dollar cost-when-new value despite the fact that it was several years old at the time it was stolen. (See Trial transcript, page 160) Victim Lisa, further testified that her other used cell phone similarly had its new value at the time of its theft as well. (See Trial transcript, page 162)

Furthermore, it is unknown whether police officers were on a vendetta or quest against this particular defendant, as the trial testimony is undisputed that the initial report of this incident indicated an inhaler taken from victim Lisa that has a value of Five Hundred Dollars, when all trial testimony indicated that this value was incorrectly included in the report and that the true value of the item was only Fifty Dollars.

Substantial pre-trial objection and argument occurred from both sides upon this valuation issue during trial (see Trial transcript, pages 112 - 120). Additional argument occurred at trial during the charging conference upon this issue (Trial transcript, page 301 - 308 and 318 - 321).

Essentially, if victims are going to be permitted to testify at trial that their cell phones do not depreciate in value, that one of the victim's cell phones in fact increased in value, and essentially testify to cost-when-new or replacement cost, and other subjective determinations based upon specifics to that individual victim, such a practice defies all bounds of fairness and essentially could permit the prosecution to convict someone of grand larceny of a paper clip assuming that victims would testify, subjectively to its value.

A much better approach to this valuation process could be best handled by an instruction, similar to the instruction given in State vs. Bingman, 654 S.E.2d 611, wherein such an instruction would focus upon current fair market value at the time of the theft. (emphasis added) In State vs. Bingman, this court noted that "The distinguishing feature between these two offenses (grand larceny and the lesser included petit larceny) is the value of the property alleged to have been taken and carried away. In that regard the value that must be established is the current fair market value of the property at the time it was alleged to have been taken. (emphasis added) The owner of the property is generally competent to establish its current market value at the time the property was taken although other witnesses may also be competent witnesses on the issue of current market value."

In the case at bar, the Petitioner takes no issue with the competency of the victims to testify regarding current market value, however the victims did not testify regarding current market value. Rather, what the victims testified to and what the trial court permitted, despite the Petitioner's objections, was primarily the replacement cost and/or cost-when-new of the phones in question.

The Petitioner submits that the manner in which the valuation was permitted to be considered by the jury was grossly unfair and inappropriate. This Defendant/Petitioner, does not deserve to be a convicted felon based upon this valuation testimony in and of itself.

CONCLUSION

Wherefore, in consideration of the arguments referenced herein, the Petitioner respectfully requests that this Honorable Court grant reversal of the conviction for Grand Larceny based upon

impermissible aggregation of multiple petit larcenies involving multiple victims of multiple purses from multiple tables, and/or, reversal of the conviction for Grand Larceny based upon impermissible evidence and/or methods of valuation.

Respectfully submitted,

GINA MARIE JERROME, Petitioner

By: _____
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CERTIFICATE BY ATTORNEY

I hereby certify, pursuant to Rule 4(A)(c) of the West Virginia Rules of Appellate Procedure, that the facts alleged herein are faithfully represented and that they are accurately presented to the best of my ability.

Mark D. Panepinto, Attorney for Petitioner

CERTIFICATE OF SERVICE

Type of Service: By Regular U. S. Mail

Date of Service: October 10, 2013

Person(s) Served: Scott E. Johnson, Esq.
Senior Assistant Attorney General
State of West Virginia
Office of the Attorney General
812 Quarrier Street, 6th Floor
Charleston, WV 25301

Item Served: **PETITIONER'S BRIEF**

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